IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER, APPELLEE.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of the Fourth Judicial District of said Territory, in and for Yavapai county, for $12,332.08, in favor of James I. Gardner, appellee, and against the Henrietta Mining and Milling Company, appellant here, and plaintiff in error below.

This was an action in the District Court by appellee against appellant, upon an open account, and a large number of assigned accounts, all of which were declared on in an action of debt. An attachment writ was sent out also, and all mines and mining property belonging to appellant company were seized and ordered sold, to satisfy the judgment *in personam*, rendered on an alleged default of said company.

These proceedings, and all that took place in the course of them, arose and proceeded in the following order and dates, to wit:

(1) The complaint and exhibits (Tr. p. 1 to 29 inclusive) were filed December 4, 1894.

(2) Affidavit for attachment was filed December 24, 1894 (Tr. p. 30).

(3) Bond for attachment was filed same date (Tr. p. 31–32).

(4) Writ of attachment was issued same date (Tr. p. 31–32).

(5) Return of writ December 26, 1894, shows seizure of vast amount of defendant's property (Tr. p. 32–33).

(6) December 26, 1894, affidavit of non-residence was made and filed (Tr. p. 33–34), as follows, to wit:

"James I. Gardner, being first duly sworn, deposes and says that "he is the plaintiff in the above entitled action; that the defendant "is a corporation organized and existing under and by virtue of "the laws of the State of Illinois, and doing business and owning "property in the said county of Yavapai, Territory aforesaid, but "has no legally appointed and constituted agent in this Territory; "that he is informed and believes, and upon such information and "belief states the fact to be, that the principal office of the said cor- "poration is in the City of Chicago, State of Illinois, and as to a "more definite address of said defendant in said city he is not "advised. (Signed)

JAMES I. GARDNER."

(Subscribed and sworn to.)

(7) December 26, 1894, *and not before*, summons was issued. (Tr. p. 34.)

(8) February 25, 1895, summons was returned. The return is as follows:

"Office of the sheriff of Yavapai County.

"I hereby certify that I received the within summons on the 28th "day of December, 1894, and personally served the same on the "defendants by causing to be published once a week for four weeks "in the Prescott Courier, a newspaper published at Prescott, "Yavapai County, Arizona, as follows, January 4, January 11, "January 18 and January 25, 1895, a true copy of the complaint in "the action named in said summons, attached to said summons. "A copy of said summons is hereto attached and made a part of "this return. Dated this 25th day of February, 1895.

G. C. RUFFNER, Sheriff,
By J. P. Dillon, Deputy.

(9) December 26, 1895, affidavit of publication of summons was filed. (Tr. p. 35–36).

(10) April 2, 1895, default was entered. (Tr. p. 36.)

(11) Same date, judgment *in personam* was rendered and property ordered sold. (Tr. p. 36–40.)

(12) April 4, 1895, judgment roll was certified. (Tr. p. 40.)

It will be seen from the record that the proceedings from the filing of the complaint to the certificate of the judgment roll occurred in the exact order here stated.

The only service attempted upon appellant shown by the record is the publication above certified by the sheriff.

Par. 712, R. S. Ariz., provides for filing affidavit for publication of summons, viz.:

"When any party to a suit, his agent or attorney, shall make "affidavit at the time of instituting the suit or at any time during "its progress that the defendant is a non-resident of the terri- "tory, or that he is absent from the territory, or that he is a "transient person, or that his residence is unknown to the "affiant, or is a corporation incorporated under the laws of

"any other state or territory or foreign country, and doing "business in this territory or having property therein, but having "no legally appointed and constituted agent in this territory, or "that such defendant conceals himself to avoid the service of sum- "mons, the clerk shall issue a summons directed to the defendant "as in other cases, and shall deliver the same to the sheriff of the "county in which the suit is pending, and said sheriff shall serve "the same by making publication thereof in some newspaper pub- "lished in his county, etc. * * * Such summons shall be "published at least once in each week for four successive weeks."

Paragraph 713, R. S. Ariz., provides that *when the residence of the defendant is known*, the plaintiff, his agent or attorney, shall forthwith deposit in the postoffice, postage prepaid, a copy of the summons and complaint, directed to the defendant at his place of residence.

It is stated in the affidavit of appellee, that appellant company is a corporation organized under the laws of the State of Illinois, and upon his information and belief, that its principal office is in the City of Chicago, State of Illinois.

No copy of the summons and complaint was deposited in the postoffice, postage prepaid, directed to the defendant at its place of residence, as required by this statute.

The statute of Arizona, acts of 1891, page 49, provides:

"*The plaintiff at the time of issuing the summons or at* any time "thereafter" (not before) "may have the property of the defendant "attached as security for the satisfaction of any judgment that may "be recovered, unless the defendant give security to pay such judg- "ment," etc.

In this case the writ of attachment was issued December 24, 1894, (Tr. 31–32) two days *before* summons, which was issued December 26, 1894. (Tr. 34–35.)

This is the condition in which appellant, December 28, 1895, found the record when the petition in error was filed and proceedings thereon taken. (Tr. p. 40).

The errors assigned arise from the face of the record.

ERRORS ASSIGNED.

The errors here assigned upon the record (Tr. pg. 61) are :

1st. The court erred in sustaining the judgment of the District Court in which that court rendered personal judgment against defendant there, the appellant herein, for the sum of $12,332.05, with cost and interest thereon, on constructive service alone and without any kind of personal service whatever.

2d. The court erred in sustaining the judgment of the said court below in which the attachment proceedings were sustained and judgment of foreclosure of the same ordered, without there having been any actual or constructive notice of any kind whatever given to defendant of the institution of any such proceedings or of any other kind, and therefore erred in holding that attachment

proceedings may be instituted and foreclosed against appellant's property without any notice whatever of such proceedings.

3d. The court erred in sustaining the judgment of the said court below in rendering judgment that the said property attached in the said action be sold without any finding of fact on which to base the same, and without any judgment of condemnation of the same.

4th. The court erred in sustaining the said judgment of the court below, in which the said court held that the attachment in the said cause, which was issued and executed before the issuance and delivery of the summons, was valid under the statute providing for the issuance of the writ of attachment at any time after or at the time of the issuance of the summons in the action. Hence the court erred in holding that writs of attachment issued before the issuance of summons in the action are valid, notwithstanding the provisions of the statute "that at the time, or at any time after the issuance of the summons," etc., writs of attachment issue, etc.; and hence the court erred in not holding that the said attachment in this case was void, and therefore the court erred in not reversing the said judgment and remanding the same for further proceedings.

The errors assigned in the Supreme Court of the Territory March 17, 1897 (Tr., pg. 58), are:

First. The court erred in holding that there was any service of process upon the defendant and plaintiff in error, the said Henrietta Mining and Milling Co., and the court erred in not reversing the case for want of service.

Second. The court erred in holding that the attachment in the said cause was valid, and not void, the same having been issued before there was any summons issued, in violation of the statute of the Territory of Arizona.

Third. The court erred in affirming the judgment of the court below, the same being a personal judgment on constructive service, and a judgment in attachment proceedings on a void writ.

Fourth. The court erred in not reversing said judgment and in not sustaining the errors assigned in the record and proceedings in the trial court.

BRIEF.

1. The judgment of the District Court, *in personam*, against appellant, a non-resident of the Territory, without personal service of process upon it, or its appearance, is without any validity.

Penoyer v. *Neff*, 95 U. S. 714, and cases there cited.

2. The judgment sustaining the attachment and directing a sale of the property attached, is void, because such judgment can not be lawfully rendered without *notice of some kind*, to the owner of the property that such proceeding has been instituted.

Drake on Attachments, 6th Ed., 436 *et seq.*

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.

Cummings v. *Tabor*, 61 Wis. 185.
Warner v. *Webster*, 13 Ohio, 505.
Earle v. *McVeigh*, 95 U. S. 503.
3 Am. & Eng. Ency. of Law, 2d Ed., pgs. 184, 185.

3. When judgment is obtained by default, upon publication of notice, every requirement of the statute must be observed.
Drake on Attach., 6th Ed. 436 *et seq.*

4. The attachment, issued *before* the summons, is a nullity.
Encyc. Plead., Vol. 3, page 50.
Hall v. *Grogan*, 78 Ky. 11.
Keller v. *Stanley*, 86 Ky. 240.
Low v. *Henry*, 9 Cal. 558.

ARGUMENT.

Having no notice of the suit, and no knowledge of the judgment until months after its entry, appellant is confined strictly to the record made by appellee.

It is alleged in the complaint, and also in the affidavit of non-residence, that appellant is a foreign corporation organized under the laws of Illinois, with situs or residence in the city of Chicago, and without local agent in Arizona.

The fact that appellant company is a non-resident, and that its residence or situs was known to appellee, and that there was no personal service, are the basis of the first three assignments of error.

The face of the judgment shows it to be a judgment *in personam*. (Tr. 38, Rec. 63.)

The return of the sheriff is that he "personally served the same on the defendants *by causing to be published*" * * * a true copy of the complaint.

As Par. 713, R. S. Ari., requires that *when the residence of the defendant is known*, the plaintiff, his agent or attorney, shall forthwith deposit in the postoffice, postage prepaid, a copy of the summons and complaint, directed to the defendant at his place of residence, a simple publication in a local newspaper is in no sense a compliance with statutory requirements, and consequently there was no personal service, and no jurisdiction over appellant or its property was obtained, and the judgment was and is erroneous, if not void. The writ of attachment (Tr. 31–32, Rec. 49) is simply an order to attach. It contains no order to summon defendant, and the only return upon it is of attachment. So it is clear that the only attempt at personal service on appellant shown by the record is the mere publication in a local newspaper of a copy of the complaint. That such personal judgment is void is established by this court.

Penoyer v. *Neff*, 95 U. S. 714, and cases there cited.

2. Regarding the proceeding as one in the nature of a proceeding *in rem*, the question is whether the requirements of the statutes of Arizona as to notice to defendant (appellant) were observed. The remedy by attachment is extraordinary, statutory, and in deroga-

tion of the common law, and therefore the rule is that the statutory provisions upon which the right depends, should be strictly construed, as to both the modes and the subjects of attachment. It is not an independent proceeding, but one merely in aid of an action commenced concurrently with or before the proceeding in attachment.

3 Am. & Eng. Ency. of Law, 2d Ed., 184, and cases there cited.

On page 185 of the same volume the law is briefly and clearly stated as follows: "An attachment is in the nature of, but is not, strictly speaking, a proceeding *in rem*, since that only is a proceeding *in rem*, in which the process is to be served upon the thing itself. If, in an attachment suit, the defendant is served with personal notice or voluntarily appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable under the control of the court to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of notice on him, other than constructive notice, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In *Earle* v. *McVeigh*, 91 U. S. 503, it is stated, "No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense, is a maxim of universal application; and it affords the rule of decision in this case."

The statute involved in that case provided that notice might be posted on the "front door of the party's usual place of abode," and defendant had removed from the house where notice was posted some six weeks before the posting.

See also, Drake on Attach., 6th Ed., 436 *et seq.*

Cummings v. *Tabor*, 61 Wis. 185.

Warner v. *Webster*, 13 Ohio, 505.

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.

In this case there is no pretense that notice of any kind whatsoever of the *attachment* proceedings was ever given to appellant. True, the statute makes no provision as to how it shall be given, or that it shall be given at all. But it can not be said that such a judgment can be lawfully rendered without notice, at least, of some kind, for to do so would be to take property without due process of law.

In Drake on Attach., 7th Ed., 437, it is stated: "When, however, jurisdiction has been obtained (by levy), the subsequent proceedings must *conform to the law*, in order to make the action of the court effectual. Want of such conformity will be error, and therefore a good ground for reversing the judgment of the court," etc.

The publication of summons was ineffectual to give jurisdiction to proceed to judgment, as the statute requires in this case, that a copy of the summons and complaint should be forthwith deposited in the postoffice, postage prepaid, directed to the defendant (appellant) at its place of residence.

In fact, both the publication of summons and the mailing of a copy of summons and complaint are required to make service complete, and unless complete, there is no service.

The pleadings and affidavit show that the residence of defendant was known, and the record shows that, so knowing it, plaintiff failed to mail a copy of the complaint and summons as required by statute, and hence the record shows such judgment to have been without service.

3. As this is a judgment by default, every requirement of the statute must be complied with, and such compliance must affirmatively appear in the record.

Drake on Attach., Ib.

In this case the failure is patent on the face of the record.

We take it to be a general rule that property taken under attachment proceedings, especially where no personal service is had, before that property can be sold a judgment of condemnation—that is, that it be adjudged to be the property of defendant, subject to sale for the satisfaction of the debt for which it was seized—and that it be sold for that purpose, all of which does not appear. It only appears that property levied upon was ordered sold. No adjudication of an attachment lien.

4. Referring to the eighth assignment of errors, there is evidently emphatic fatal error in the attachment proceedings in this cause, in this, that the writ of attachment was issued and levied before the issuance of the summons in the action.

This was in the face of the statute, and at war with the decided law on the point.

Our statute, acts of 1891, page 49, provides:

"*The plaintiff at the time of issuing the summons or at* any time "thereafter" (not before) "may have the property of the defendant "attached as security for the satisfaction of any judgment that may "be recovered, unless the defendant give security to pay such judg-"ment," etc.

Here is the only license given to attach property, and it must be strictly followed. This does not permit the attachment writ to precede the summons.

The attachment may issue with the summons, or afterward, but not before.

Encyc. Plead., Vol. 3, page 50.

It is void if issued before.

Hall v. *Grogan*, 78 Ky. 11.

Keller v. *Stanley*, 86 Ky. 240.

Low v. *Henry*, 9 Cal. 558.

This last case decides this point, for it is based on a statute precisely like ours, and from which ours was borrowed, using its identical language.

As Arizona took this statute from California, it is assumed that it did so, and adopted also the judicial construction of the act. The court in that case say:

"The twenty-second section of the practice act provides that

"a suit shall be commenced by the filing of a complaint and "the issuance of a summons; and the one hundred and twentieth "section allows the plaintiff at the time of issuing the summons, or "at any time afterward, to have the property of the defendants "attached. These provisions must be strictly followed; and the "attachment, if issued before the summons, is a nullity. The issu-"ance of the summons afterward, can not cure that which was "void from the beginning."

It is useless to elaborate. This is decisive. The Supreme Court of the territory filed no opinion, hence it is impossible to know the views of that court.

We submit that the judgment should be reversed.

WM. H. BARNES,
Attorney for Appellant.

IN THE

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OCTOBER TERM, 1898.

No. 140.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER, APPELLEE.

SPECIFIC CITATION OF AUTHORITIES FOR APPELLANT, FILED BY LEAVE OF COURT.

By leave of the court, granted at the close of the oral argument, appellant cites the following authorities specifically to save labor on the part of the court in selecting pertinent cases cited in a general way in the briefs heretofore filed.

The judgment in the District Court, *in personam*, against appellant, a non-resident of the territory, without personal service of process upon it, or its appearance, is without any validity.

Pennoyer v. *Neff*, 95 U. S. 714.
Galpin v. *Page*, 18 Wall. 366.
D'Arcy v. *Ketchum et al.*, 11 How. 175.
Harris v. *Hardeman*, 14 How. 339.
Story's Com. on Conflict of Laws, Sec. 539.
3 Burge's Colonial Law, p. 1044.
Picquet v. *Swan*, 5 Mason, 40.

The recital in the judgment that "the defendant was duly and regularly served with process herein," will be read by the court in connection with the return of the sheriff that he "personally served" the summons "by causing it to be published," etc., in a local newspaper.

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.
Settlemier v. *Sullivan*, 97 U. S. 444.
Miller v. *Ewing*, 8 Smedes & Marshall, 421.

Torrey v. *Jordan*, 4 How. 401.
Dean v. *McKinstry*, 2 Smedes & Marshall, 213.

Regarding the judgment as *in rem*, the proceeding is statutory and in derogation of the common law, and therefore the rule is that the statutory provisions upon which the right depends should be strictly construed as to both the modes and subjects of attachments. When jurisdiction is obtained by levy, the subsequent proceedings must *conform to the law*, in order to make the action of the court effectual. Want of such conformity will be error, and therefore a good ground for reversing the judgment of the court. Jurisdiction must affirmatively appear on the face of the proceedings.

Drake on Attach., 6 Ed. 436 *et seq.*
Cummings v. *Tabor*, 61 Wis. 185.
Moore v. *Hamilton*, 7 Ill. 429.
May v. *Baker*, 15 Ill. 89.
Haywood v. *McCrory*, 33 Ill. 459.
Haywood v. *Collins*, 60 Ill. 328.
Firebaugh v. *Hall*, 63 Ill. 81.
Louisville, etc, R. R. Co. v. *Parish*, 6 Ind. App. 89.
Wilkie v. *Jones*, Morr. (Iowa), 97-132, 2d Ed.
Musgrave v. *Brady*, Morr. (Iowa), 456 600, 2d Ed.
Tiffany v. *Glover*, 3 Green (Iowa), 387.
Pool v. *Webster*, 3 Metc. (Ky.), 278.
Pierce et al. v. *Merritt et al.*, 13 La. Ann. 526.
Frellson v. *Stewart*, 14 La Ann. 844.
McPherson v. *Snowdon*, 19 Md. 197.
Woolkins v. *Hard*, 49 Mich. 299.
Buckley v. *Lowry*, 2 Mich. 418.
Caldwell v. *Sibley*, 3 Minn. 406.
Rankin v. *Dulaney*, 43 Miss. 197.
Humphrey v. *Wood*, Wright (Ohio), 566.
Gooding v. *Pearce*, 13 R. I. 532.
Caldwell v. *Haley*, 3 Tex. 317.
Banksdale v. *Henderson*, 2 Patt. & H. (Va.), 43.
Delaplain v. *Armstrong*, 21 W. Va. 211.

No presumption will be indulged to support an attachment. Jurisdiction must affirmatively appear.

Frocke v. *Hardman*, 67 Tex. 173.
Haywood v. *Collins*, 60 Ill. 332.

The rule is different only in Georgia, and is there changed by statute.

Force v. *Hubbard*, 26 Ga. 290.

The foregoing authorities apply equally to the two cases preceding this upon the docket against the same appellant, as they were proceedings to establish statutory liens.

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FRANK ASBURY JOHNSON, *of Counsel.*